ACTION

OFFICE OF CONGRESSIONAL AFFAIRS

Routing Slip

	ACTION	INFO
1. D/OCA		XX
2. DD/Legislation	XX	[redacted]
3. DD/Senate Affairs		XX
4. Ch/Senate Affairs		
5. DD/House Affairs		XX
6. Ch/House Affairs		
7. Admin Officer		
8. Executive Officer		
9. FOIA Officer		
10. Constituent Inquiries Officer		
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SUSPENSE 11 MAY 88
Date

25X1

Action Officer: [redacted]

Remarks: ARRIVED IN OCA REG 5 MAY 88
Action completed per telephone w/ B. Jones & followed up w/ MFR #88-1470 OCA dtd 5/10/88 "no objection."

EJ 5 MAY 88
Name/Date

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9. FOIA Officer		
10. Constituent Inquiries Officer		
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Action Office

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Name/Date

OCA 1442-88

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

SPECIAL

May 4, 1988

LEGISLATIVE REFERRAL MEMORANDUM

TO: SEE ATTACHED DISTRIBUTION LIST

Leg

SUBJECT: Department of Justice views on S. 1975 -- "Comprehensive Federal Law Enforcement Improvements Act of 1987."

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with Circular A-19.

Please provide us with your views no later than May 11, 1988.

Direct your questions to Gregory Jones (395-3454), of this office.

James C. Murr for
Assistant Director for
Legislative Reference

Enclosures

cc: A.B. Culvahouse, Jr.
Bob Damus
Karen Wilson
Sam Adams
Frank Seidl
Hilda Schreiber

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U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable James C. Miller
Director
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Miller:

This letter responds to your request for the views of the Department of Justice on S. 1975, the Comprehensive Federal Law Enforcement Improvements Act of 1987. The Department of Justice recommends against enactment of this legislation.

S. 1975 contains two titles. Title I, which covers a number of law enforcement related subjects, includes five provisions that are of particular interest to the Department: (1) section 102, which would authorize payment of travel and transportation expenses of new federal law enforcement officers to their first duty stations; (2) section 103, which would expand the investigative jurisdiction and law enforcement authority of investigators of the offices of Inspectors General; (3) section 105, which would enlarge the investigative jurisdiction and law enforcement authority of employees of the General Accounting Office; (4) section 106, which would make it a federal offense under 18 U.S.C. 1114 to assault or kill a GAO investigator; and (5) section 108, which would amend the Federal Tort Claims Act to make the government civilly liable for certain intentional torts committed by GAO investigators. 1/ Title II of the bill would establish a National Advisory Commission on Law Enforcement to study and make recommendations concerning issues relating to the compensation of federal law enforcement personnel. With the

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1/ Section 101 is also of interest to the Department, in that it would liberalize the requirements for hazardous duty early retirement under the Federal Employees Retirement System. However, that result has already been achieved by the enactment of H.R. 3395, which was signed by the President earlier this year.

exception of section 102, the Department believes that each of these provisions is ill-advised, for the reasons set forth below. 2/

1. Section 103: This portion of the bill deals with two subjects -- the jurisdiction of Inspector General investigators, and their law enforcement authority. With respect to jurisdiction, section 103 would permit IG investigators, subject to guidelines promulgated by the Attorney General, to "conduct investigations concerning any violations of United States law relating to the programs, personnel, or operations of [their] establishments." The Department objects to this provision on the grounds that it would broaden considerably the investigative jurisdiction of the Inspectors General and, in some instances, duplicate existing investigating authority. No justification for expanding IG jurisdiction in this manner was suggested by the principal sponsors of S. 1975 in their floor statements, and we know of none. Moreover, for the reasons discussed below, we do not think the expansion of IG jurisdiction is rendered acceptable by making its exercise subject to guidelines promulgated by the Attorney General.

The remainder of section 103 would permit IG investigators -- subject, again, to Attorney General guidelines -- to exercise a variety of law enforcement powers normally reserved to traditional law enforcement agencies. This enlargement of IG law enforcement authority is also objectionable to the Department, because the blanket approach taken by the section is inconsistent with the Attorney General's 1984 "Guidelines for Legislation Involving Federal Criminal Law Enforcement Authority," and unnecessary in light of the effectiveness of existing mechanisms for making various kinds of law enforcement assistance available to the Inspectors General as the need arises, on a case-by-case basis.

Under the 1984 guidelines, a copy of which is attached, the extension of law enforcement authority to agencies not now possessing it is to be the exception rather than the rule, and should be considered on a case-by-case basis in accordance with specific criteria relating to specific types of law enforcement authority. It should be noted that the purpose of the guidelines is not to frustrate legitimate requests for law enforcement

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2/ With respect to section 102, it should be noted that the Department has previously supported the enactment of legislation that would authorize the payment of new agents' initial travel and transportation expenses. See the United States Marshals Service Act of 1987, which was submitted to OMB for review on April 10, 1987. The Department continues to support the enactment of such legislation, but believes that the attractiveness of S. 1975 in this respect is far outweighed by the bill's numerous undesirable features.

authority, but rather to provide rational standards for considering such requests, in order to avoid unnecessary and undesirable proliferation of federal police powers.

Instead of following the selective approach advocated by the guidelines, S. 1975 would confer all of the usual forms of law enforcement authority on all of the Inspector General offices at one time. This indiscriminating approach makes no distinction among Inspectors General on the basis of their need for law enforcement authority. It would permit each IG to authorize his investigators to serve process, execute warrants, make warrantless arrests, and carry firearms, whether or not the exercise of such authority is necessary to the effective performance of that IG's essential functions. One can certainly question the need for or wisdom of granting broad law enforcement powers to the Inspectors General of the Department of Education or of the Small Business Administration, to take but two examples of the ill-advised nature of this proposal.

Moreover, section 103 would grant new law enforcement authority to Inspectors General without regard to such questions as whether their need for such authority is continuing or sporadic, and whether that need could be satisfied by assistance from agencies already possessing such authority. In fact, it has been the Department's experience that, to the extent that particular Inspectors General need additional law enforcement authority in the context of specific investigations, a number of mechanisms exist and are being used effectively to meet such needs by drawing on the resources and authority of traditional law enforcement agencies. Among these mechanisms are Memoranda of Understanding and working agreements between the Inspectors General and traditional law enforcement agencies, such as the FBI and the DEA, the practice of granting particular IG investigators Deputy U.S. Marshal status for the purpose of specific investigations, and action by the Attorney General under Rule 41(h) of the Federal Rules of Criminal Procedure authorizing certain IG investigators to request the issuance of search warrants.

It is true, of course, that some of these alternative arrangements may require a traditional law enforcement agency to commit scarce resources to activities that are not among its priorities, and that IG investigators who were granted law enforcement authority under S. 1975 might be subject to greater control by the Attorney General than Special Deputy U.S. Marshals are now. However, these do not strike us as compelling arguments in favor of section 103. If the ability of a traditional law enforcement agency to perform its essential functions would be jeopardized by diversion of its resources to an unrelated Inspector General investigation, an alternative arrangement, such as deputation, could be used. And even if S. 1975 gave the Attorney General greater control over Special Deputy U.S. Marshals than he has at present, the broad and

unnecessary proliferation of law enforcement power that would result from passage of the bill seems an extraordinarily high price to pay for that relatively modest advantage.

Finally, there remains to be considered the effect of the introductory language of section 103, which provides that IG investigators are to exercise their expanded jurisdiction and authority "[s]ubject to guidelines promulgated by the Attorney General." It is not clear to what extent -- if at all -- this proviso could be employed to overcome the defects in section 103 discussed above. Much would depend on the interpretation given to the proviso. On the one hand, it could be construed as giving the Attorney General wide latitude in specifying the kinds of investigations the Inspectors General could undertake under section 103 and the conditions under which they could employ the various law enforcement powers provided therein, perhaps even to the point of allowing him to prevent some IG investigators from exercising any jurisdiction or authority under section 103, and enabling him to control the activities of others on a case-by-case basis. At the very least, such a broad interpretation would apparently permit the Attorney General to apply an appropriately modified version of the 1984 guidelines to IG investigations under section 103, in which event there might be no impairment of the philosophy and practical effect of those guidelines. However, even if the guidelines proviso were given a liberal interpretation, the question would remain whether enactment of section 103 would be more advantageous for federal law enforcement than the present situation. One beneficial effect might be that the 1984 guidelines would be "institutionalized" and transformed from a mere statement of Administration policy regarding legislative proposals into a set of legal requirements that would bind the Inspectors General. Beyond that, however, we doubt that federal law enforcement efforts would be made more effective than they are now.

On the other hand, the proviso might be interpreted far more narrowly -- simply as an authorization to regulate minor aspects of the exercise of the jurisdiction and authority conferred by section 103, rather than as a carte blanche to control the investigative activities of the Inspectors General. In effect, the presumption would be that all of the IGs possessed expanded jurisdiction and full law enforcement authority, subject only to "time, place, and manner" kinds of detail specified by the Attorney General. Such a narrow reading of the proviso could be supported by the argument that section 103 is intended to give Inspectors General more jurisdiction and power than they now have, an intent that would be frustrated by the adoption of Attorney General guidelines that would, in effect, allow the Attorney General to severely curtail their use of such jurisdiction and authority, or deny it entirely.

Whether a broad or a narrow interpretation is more likely to prevail is simply a matter of conjecture at this point. The floor statements of the bill's principal sponsors do not address this issue, and it is impossible to foresee how the proviso will be explained in the legislative history -- if, indeed, the legislative process produces any reference to the proviso at all. Under these circumstances, we think it would be a mistake to place any reliance on the proviso as a means of overcoming the otherwise undesirable features of section 103.

2. Section 105: The Department vigorously opposes enactment of section 105, which would expand the investigative jurisdiction and enforcement authority of the General Accounting Office. The floor statements submitted in support of S. 1975 offer no justification for this section; in fact, they do not even refer to it at all. But, beyond that, the section contains three provisions that are objectionable from the Department's perspective. These would allow GAO investigators to conduct criminal investigations and, in connection therewith, carry firearms and subpoena documents and testimony from Executive branch personnel.

Since conducting criminal investigations and carrying firearms in the course of such investigations are incidents of the Executive branch function of enforcing the law, very substantial constitutional questions of separation of powers are raised by the proposed grant of such authority to the GAO, which is part of the Legislative branch. See Bowsher v. Synar, 106 S. Ct. 3181 (1986). It is not difficult to imagine situations in which the exercise of such authority by the GAO would be wasteful at best and, at worst, could cause irreparable damage to ongoing criminal investigations being conducted by the Department or other Executive branch law enforcement agencies. For example, because the GAO is not subject to the control of the Executive branch and has no Memoranda of Understanding or working agreements with traditional law enforcement agencies, there would be no way to ensure that its criminal investigations did not duplicate those of other agencies, or that they did not undermine sensitive relationships developed by those agencies with critical witnesses.

Nor is it difficult to foresee the serious harm that could result from permitting the GAO to subpoena documents and testimony from Executive branch agencies relating to ongoing criminal investigations. The GAO's use of this power could create risks to those investigations, possibly prejudice the rights of third parties, "chill" future investigative efforts, and subject the prosecutorial decision making process to inappropriate congressional pressures. In addition, forced disclosure of law enforcement files to persons not traditionally involved in the investigative and prosecutorial process could damage effective law enforcement by revealing sensitive strate-

gies and techniques or the identity of confidential informants, and could damage public confidence in the integrity and fairness of the law enforcement process.

3. Section 106: The Department also objects to this section, which would expand 18 U.S.C. 1114 to include GAO investigators among the federal officers the assaulting or killing of whom is a federal offense. In our view, the better approach to expanding the coverage of this statute is to use the regulatory process authorized by the statute and recently employed by the Attorney General after a lengthy and careful evaluation of applications from numerous agencies. See 28 C.F.R., Part 64. It is more efficient and effective in the first instance to use the regulatory rather than the legislative process in assessing the appropriateness of coverage under this statute, and Congress can always resort to legislation if it is dissatisfied with the Attorney General's response to a request to include GAO personnel within the coverage of the statute. We note, in addition, that if section 105 were removed from the bill there would appear to be no basis for such a request.

4. Section 108: This section would amend the definition of the term "investigator or law enforcement officer" in the Federal Tort Claims Act (28 U.S.C. 2680(h)) to include GAO investigators, thereby exposing the government to civil liability for certain intentional torts committed by them. Consistent with our opposition to section 105's grant of criminal investigative jurisdiction to the GAO, we oppose enactment of section 108 as well.

5. Title II: This portion of the bill, would establish a National Advisory Commission on Law Enforcement for the purpose of conducting a six-month study of issues relating to the compensation of federal law enforcement officers. Although nominally designated as an independent agency within the Legislative branch, the Commission would include members of the Executive branch, and its report would be submitted to the President as well as to Congress. Title II has some appeal, in that creation of the proposed Commission could lead to improvements in the government's ability to attract and retain the best possible law enforcement officers. On the other hand, the creation of a commission -- even if it is only an advisory body -- that resides in more than one branch, is objectionable on the policy ground that such an arrangement makes the Commission accountable to no branch of government. Moreover, we question the desirability of locating within the Legislative branch, subject to the control of an employee of that branch -- the Comptroller General, who would be the Chairman of the Commission -- a body charged with examining issues relating to the uniquely Executive branch function of enforcing the law. On balance, we believe that these structural defects outweigh the Commission's potential benefits. Accordingly, we oppose enactment of title II

in its current form. However, we might be able to support this portion of the bill if it were amended to remove Legislative branch representatives from the Commission and to relocate the Commission within the Executive branch.

* * *

In conclusion, although S. 1975 has some attractive features, we think that these are far outweighed by provisions that would either cause serious damage to federal law enforcement efforts or that are otherwise undesirable. The Department of Justice, therefore, recommends against enactment of this legislation.

Sincerely,

Thomas M. Boyd
Acting Assistant Attorney General

Attachment

Office of the Attorney General
Washington, D. C. 20530

June 29, 1984

MEMORANDUM TO: Heads of Executive Departments and Agencies

FROM: William French Smith WFS
Attorney General

SUBJECT: Guidelines for Legislation Involving Federal Criminal Law Enforcement Authority

Authority to perform Federal criminal law enforcement functions -- including exercise of traditional police powers -- has been granted by Congress in the past to numerous Federal agencies. It is necessary, from time to time, to consider whether such authority should be extended to additional agencies. There have never existed any general standards for systematically evaluating the assignment of such authority. Since such authority is critical to the preservation of ordered liberty and at the same time involves the most potentially intrusive of all governmental powers, a responsible government should assure that it is granted cautiously, monitored carefully, and exercised responsibly. It is important -- both from the standpoint of safeguarding the individual liberties of innocent citizens and of assuring the most effective operation of the law enforcement function -- that the Administration employ reasonable standards for evaluating future proposals for further statutory grants of Federal criminal law enforcement authority.

Such standards, in the form of guidelines contained in an Administration Policy Statement, are attached. This policy statement was proposed by the Cabinet Council on Legal Policy, and has been approved by the President. It is effective immediately.

Attachment

ADMINISTRATION POLICY STATEMENT

GUIDELINES FOR LEGISLATION INVOLVING FEDERAL CRIMINAL LAW ENFORCEMENT AUTHORITY

1. Purpose. This Administration Policy Statement establishes guidelines to: (1) guide all Federal agencies in preparing legislative proposals concerning future grants of law enforcement authority; (2) guide the Department of Justice and the Department of the Treasury in evaluating legislative proposals involving grants of Federal law enforcement authority; and (3) guide the Office of Management and Budget (OMB) in making recommendations, in accordance with Circular A-19, concerning: (a) the submission of such legislative proposals to Congress; and (b) the signing, by the President, of enrolled bills involving grants of Federal law enforcement authority. These guidelines are for prospective application only. They do not supersede any existing law enforcement or other authorities provided by statute.

2. Background. From time-to-time agencies propose legislation that would extend criminal law enforcement authority (e.g., authority to conduct a warrantless search or to carry a firearm) to themselves or to other agencies. On other occasions, agencies are asked to provide Congress with reports on pending bills that would extend such authority. No guidelines have been available to the agencies, however, to ensure a consistent approach to proposed or pending legislation that contains criminal law enforcement authority. Guidelines of this nature are necessary in order to provide sound criteria and a systematic process for considering such authority when proposed, and to avoid unnecessary and undesirable proliferation of criminal law enforcement authority.

3. Definitions. For the purpose of this Policy Statement, the following definitions apply:

a. Accredited Course of Training. A course of instruction offered by the Federal Law Enforcement Training Center, or an equivalent course of instruction offered by another Federal agency.

b. Agency. Any executive department or independent commission, board, bureau, office, agency, Government-owned or controlled corporation, or other establishment of the Government, including any regulatory commission or board and the Office of the Inspector General of a department or agency.

c. Covert Investigative Technique. Electronic surveillance, an undercover operation, the use of a paid informant, or any other method of obtaining evidence of crime in a clandestine manner other than by means of routine surveillance or from a volunteer informant.

d. Pending Bill. Any bill or resolution that has been introduced in Congress or any amendment to a bill or resolution while in committee or when proposed for House or Senate floor consideration during debate. Also, any proposal placed before the conferees on a bill that has passed both Houses.

e. Proposed Legislation. A draft bill or any supporting document (e.g., Speaker letter, section-by-section analysis, or statement of purpose and justification) that an agency wishes to present to Congress for its consideration. Also, any proposal for, or endorsement of, legislation included in an agency's annual or special report or in other written form that an agency proposes to transmit to Congress, or to any Member or committee, officer or employee of Congress, or staff of any committee or Member, or to make available to any study group, commission, or the public.

f. Report (including testimony). Any written expression of official views prepared by an agency on a pending bill for (1) transmittal to any committee, Member, officer, or employee of the Congress, or the staff of any committee or Member, or (2) presentation as testimony before a congressional committee. Also, any comment or recommendation on a pending bill that is included in an agency's annual or special report that an agency proposes to transmit to Congress, or to any Member or committee, officer or employee of Congress, or staff of any committee or Member, or to make available to any study group, commission, or the public.

4. General Policy. In general, an agency should not have criminal law enforcement authority unless:

a. the agency's ability to perform an essential function within its jurisdiction is significantly hampered by its lack of criminal law enforcement authority;

b. the agency's need for such law enforcement authority cannot be met effectively by assistance from law enforcement agencies with such authority;

c. adequate internal safeguards and management procedures exist to ensure proper exercise of the authority by the agency; and

d. the advantages attributable to the agency's possession of the authority can reasonably be expected to exceed the disadvantages that are likely to be involved in its exercise of the authority.

5. Guidelines. Before submitting to OMB for coordination and clearance, pursuant to OMB Circular A-19, any proposed legislation or report on a pending bill that would extend criminal law enforcement authority to an agency, an agency

shall make a determination that the proposed extension of criminal law enforcement authority is in substantial compliance with the following guidelines, as applicable:

a. Authority to Carry a Firearm. An agency should not be authorized to permit an employee to carry a firearm unless:

(1) there is a significant likelihood that, in the course of performing his assigned duties, the employee will be placed in situations in which his use of a firearm would be permitted by law to:

(i) protect himself from a threat of imminent death, serious bodily injury, or kidnapping;

(ii) prevent another person from causing imminent death or bodily injury to, or kidnapping of, a person who is under his protection; or

(iii) prevent the imminent loss or destruction of, or damage to, property of substantial value that is under his protection;

(2) it is unlikely that timely and effective assistance will be available from another agency;

(3) the employee has graduated from an accredited course of training in the carrying and use of firearms, and is currently qualified in their use; and

(4) the agency agrees that, if the requested authority is granted, the agency will establish policies and procedures, approved by the Attorney General, for preventing the unauthorized use or misuse of firearms by its employees, including a requirement that an employee's authority to carry a firearm be approved by a designated senior official of the agency on a limited basis.

b. Authority to Seek and Execute an Arrest or Search Warrant. Except as provided in section 5f. of this Policy Statement, an agency should not be authorized to permit an employee to seek and execute an arrest warrant or a search warrant unless the authority is limited to the arrest of a person who there is reason to believe has committed an offense within the jurisdiction of that agency, or an offense involving resistance to the employee's authority, or to a search for, and seizure of, property related to such an offense, and:

(1) there is a significant likelihood that, in the course of performing his assigned duties, the employee will frequently encounter situations in which it is necessary to make such an arrest or search;

(2) it is unlikely that timely and effective assistance will be available from another agency;

(3) the employee has graduated from an accredited course of training in the execution of arrest and search warrants; and

(4) the agency agrees that, if the requested authority is granted, the agency will establish policies and procedures, approved by the Attorney General, for preventing the unauthorized use or misuse of the power to seek and execute arrest or search warrants by its employees.

c. Authority to Make a Warrantless Arrest. An agency should not be authorized to permit an employee to make an arrest without a warrant unless the authority is limited to the arrest of a person who the employee has probable cause to believe has committed a felony, or a person who has committed a felony or a misdemeanor in the employee's presence, and:

(1) there is a significant likelihood that, in the course of performing his assigned duties, the employee will frequently encounter situations in which it is necessary to make such an arrest promptly;

(2) it is unlikely that timely and effective assistance will be available from another agency;

(3) the employee has graduated from an accredited course of training in the exercise of the power to arrest; and

(4) the agency agrees that, if the requested authority is granted, the agency will establish policies and procedures, approved by the Attorney General, for preventing the unauthorized use or misuse of the power to arrest by its employees.

d. Authority to Serve a Grand Jury Subpoena or Other Legal Process. An agency should not be authorized to permit an employee to serve a grand jury subpoena, a summons, a court order, or other legal process unless:

(1) there is a significant likelihood that, in the course of performing his assigned duties, the employee will frequently encounter situations in which it is necessary to serve such process;

(2) it is unlikely that service can be made as conveniently or expeditiously by personnel of another agency;

(3) the employee has been trained in the requirements of service of process; and

(4) the agency agrees that, if the requested authority is granted, the agency will establish policies and procedures, approved by the Attorney General, for preventing the unauthorized use or misuse of the power to serve process by its employees.

e. Authority to Administer an Oath or Affirmation. An agency should not be authorized to permit an employee to administer an oath or affirmation unless:

(1) there is a significant likelihood that, in the course of performing his assigned duties, the employee will frequently encounter situations in which it is necessary or desirable to take a person's statement or testimony under oath or affirmation;

(2) it is unlikely that the oath or affirmation can be administered as conveniently or expeditiously by personnel of another agency;

(3) the employee has been trained in the requirements of administering oaths and affirmations; and

(4) the agency agrees that, if the requested authority is granted, the agency will establish policies and procedures, approved by the Attorney General, for preventing the unauthorized use or misuse of the power to administer oaths or affirmations by its employees.

f. Authority to Use a Covert Investigative Technique. An agency should not be authorized to permit an employee to use a covert investigative technique unless:

(1) there is a significant likelihood that, in the course of performing his assigned duties, the employee will frequently encounter situations in which it is necessary to use such a technique;

(2) it is unlikely that timely and effective assistance from an agency with expertise in the use of such a technique will be available;

(3) the employee has graduated from an accredited course of training in the use of such a technique; and

(4) the agency agrees that, if the requested authority is granted, the agency will establish policies and procedures, approved by the Attorney General, for preventing unauthorized use or misuse, or the appearance thereof, of such techniques by its employees, including a requirement that an employee's authority to use a covert investigative technique be approved by a designated senior official of the agency on a limited basis.

6. Additional Explanation. Additional details concerning the interpretation of these guidelines are attached to this Policy Statement.

7. Effective Date. This Policy Statement is effective on publication.

8. Inquiries. Questions or inquiries regarding the requirements of this policy statement may be directed to the Associate Attorney General, Department of Justice, Washington, D.C. 20530.

Attachment

person from causing imminent death or bodily injury to, or kidnapping of, a person who is under his protection; or (iii) the employee will be required to prevent imminent loss or destruction of, or damage to, property of substantial value that is under his protection.

Examples of situations that would meet these requirements are: (i) when the employee's duties require him to make arrests or execute search warrants; (ii) when the employee is assigned to protect another person who there is reason to believe may be subjected to acts or threats of violence; (iii) when the employee's job is to protect property of substantial value which there is reason to believe may be the subject of attempted theft or destruction; and (iv) when the employee's duties primarily involve public safety or property protection functions on Federal property. A greater severity of potential bodily injury is necessary to justify the carrying of a weapon for self-protection (serious bodily injury) than is needed to warrant the carrying of a firearm to protect others (any degree of bodily injury). This distinction is made because an employee's statutory duty to protect others requires that he safeguard them from attempts to inflict any kind of physical injury, whereas his use of deadly force for self-protection is warranted only when he is threatened with serious bodily injury.

Subparagraph (1)(iii) of section 5a. covers only situations in which there is no reason to anticipate danger to the employee himself or to a person under his protection. Ordinarily, the law does not permit the use of a firearm for the sole purpose of protecting property. In some situations, however, the extraordinary value of the property to be protected may justify the carrying of a firearm. How valuable the property must be to warrant armed protection cannot be specified in precise terms. Although some property may not have great intrinsic value, its loss or destruction could nevertheless have very serious consequences. Certainly, an appropriate measure of value should encompass property the loss or destruction of which would cause substantial damage to a vital interest of the United States. For example, protection of property essential to maintaining national security, or to ensuring the uninterrupted flow of energy or communications, would warrant the carrying of firearms, even if persons are not likely to be injured directly by threats to such property. The same would be true of Federally-owned dams and reservoirs, or nuclear facilities and materials, protection of which is necessary to prevent potentially catastrophic damage to pubic health or safety. Of course, if the value of the property is such that the law does not permit deadly force to be used to protect it, an employee responsible for safeguarding the property should not be authorized to carry a firearm.

Paragraph (2) of section 5a. requires the exploration of possible alternatives before an agency is authorized to permit its

employees to carry firearms. Only if it appears unlikely that timely and effective assistance will be available from another agency should such authority be granted. Ordinarily, it will be impractical to seek outside assistance if the employee works in a remote area, if communication is difficult for other reasons, if the need for a weapon arises unexpectedly, or if there is a need to have a substantial number of armed guards on hand at all times. On the other hand, if the danger can be anticipated and met effectively by assigning an employee with arms-carrying authority to accompany the employee who lacks such authority, that course should be preferred.

The third requirement of section 5a., set forth in paragraph (3), is that the employee who is to be authorized to carry a firearm must have graduated from an accredited course of training in the carrying and use of firearms and must be currently qualified in their use. The purpose of this requirement is to ensure not only that employees possess the technical expertise to handle firearms safely and effectively, but also that they have the ability to exercise sound judgment regarding the circumstances under which it is appropriate to use their weapons. The first part of this requirement could be met by completion of the appropriate course of training at the Federal Law Enforcement Training Center at Glynco, Georgia, or an equivalent course of instruction offered by another Federal agency that provides necessary knowledge or competency. The second part of the requirement mandates periodic reevaluation of the employee's ability to exercise discretion in the use of firearms and periodic review, by means of firing range examinations, of his proficiency in the use of the particular type of firearm he is authorized to carry.

As a final safeguard against unauthorized use or misuse of arms carrying authority, paragraph (4) requires that the agency agree to establish policies and procedures, acceptable to the Attorney General, to govern the manner in which such authority is assigned and exercised within the agency, and to ensure the accountability of individual employees and their superiors for the proper use of such authority. These policies and procedures should include a requirement that an individual's authority to carry a firearm be approved on a limited basis, by a designated senior official of the agency. This last requirement is intended to prevent indiscriminate assignments of arms carrying authority. It requires that such assignments be made on an individual basis, as well as on the basis either of the requirements of the particular case or investigation to which the employee is assigned or, if the employee is not assigned to cases or investigations, on the basis of the particular functions performed by the employee.

b. Authority to Seek and Execute an Arrest or Search Warrant.

The authority to seek and execute arrest and search warrants,

covered by section 5b. is not a general authority to arrest and search for evidence relating to any type of offense. Rather, the powers referred to cover only offenses over which the agency has jurisdiction and offenses involving resistance to an employee's authority (e.g., assaulting the employee to prevent him from exercising his authority to execute a search or serve a subpoena). An additional limitation, signalled by the reference to section 5f., is that the search warrant authority referred to does not include power to seek authorization for, or to engage in, any type of electronic surveillance. This authority is treated separately, along with other covert investigative techniques (e.g., engaging in undercover operations and using paid informants), the exercise of which requires particular care and supervision.

Regarding the necessity for conducting searches, one factor to be considered is whether an alternative method, such as the use of a subpoena, is available and would be equally effective.

paragraphs (2), (3), and (4) involve essentially the same considerations as the counterpart requirements for obtaining authority to carry firearms. With reference to paragraph (2), as it relates to search warrant authority, additional factors to be considered are the location of the search, the nature of the items to be seized, the need for special expertise in identifying those items, and the amount of time that will be needed to complete the search.

c. Authority to Make a Warrantless Arrest.

Unlike section 5b., which limits arrest and search warrant authority to offenses within the agency's jurisdiction and offenses involving resistance to an employee's authority, section 5c. deals with broader authority to make warrantless arrests for any offenses committed in the employee's presence or for felonies committed outside his presence for which there is probable cause to arrest. Thus, in addition to permitting a warrantless arrest for an offense over which the agency has jurisdiction and an offense involving resistance to the agent's authority, section 5c. provides a foundation for the warrantless arrest of a person who the employee has probable cause to believe has committed a felony under Federal or State law, as well as a person who, in the employee's presence, commits a felony or a misdemeanor in violation of Federal or State law. This provision recognizes the desirability of permitting a Federal employee in an emergency situation to exercise common law arrest power. Explicit recognition of Federal arrest authority in emergency situations involving violations of State law should serve to protect Federal employees against uncertainties concerning their authority that might arise under State laws governing citizens' arrests.

Like the authority to carry a firearm and the power to seek and

execute arrest and search warrants, authority to make warrantless arrests should not be granted merely on the basis of convenience or speculative need. Instead, before an agency should be authorized to permit its employees to make warrantless arrests, it should make a convincing showing that, in the course of their duties, its employees can frequently be expected to encounter situations that present a need to arrest offenders promptly rather than waiting until warrants have been obtained. Examples of sufficiently exigent circumstances are situations in which the offense threatens immediate injury to persons or property, situations in which delay might reasonably be expected to permit the offender to escape, commit additional offenses, or destroy evidence, and situations in which the offense threatens to thwart the employee in carrying out his duty. If the agent is authorized under this guideline to make a warrantless arrest, he may also, of course, conduct a warrantless search incident to arrest.

Whether another agency can be relied upon to make the arrest depends on the same factors that determine whether the arrest must be made promptly, as well as on the availability of personnel from the other agency and the time it would take them to provide assistance.

Required safeguards against unlawful or inappropriate use of arrest authority (i.e., training, supervision, and oversight), backed up by approved policies and procedures are similar to those applicable to the carrying of firearms.

d. Authority to Serve a Grand Jury Subpoena or Other Legal Process.

Whereas authority to carry firearms, make arrests, and conduct searches should be granted only in response to a need that cannot be met by calling on another agency, power to serve a grand jury subpoena or other process may be conferred on the basis of a less rigorous standard: when there is a need that can be met more conveniently or expeditiously by the employee than by personnel of another agency. Factors bearing on the application of this guideline include time constraints, familiarity of the employee with the appearance and likely whereabouts of the person to be served, and any difficulties that might be anticipated in making service. In connection with this last factor, if there is reason to believe that the employee may be placed in danger in the course of attempting to make service, and if the employee is not authorized to carry a firearm, assistance should be sought from an agency whose personnel do have firearms authority. Considerations relevant to the requirements set forth in paragraphs (3) and (4) are similar to those discussed above in connection with the same requirements with respect to other types of authority, except that the employee's training need not have been acquired through an accredited training course.

e. Authority to Administer an Oath or Affirmation.

Unlike the other authorities discussed above that should not be conferred except out of necessity, authority to administer oaths and affirmations in criminal cases or investigations may be granted when it is either necessary or desirable that the employee take a statement or testimony that is sworn, or formally affirmed, to be true. Greater latitude is permitted here, because exercise of the power is not likely to be intrusive or to have harmful consequences, and because of the difficulty of making a determination that administration of an oath or its equivalent is necessary in order to ensure that the person being questioned responds fully and truthfully.

In other respects, the requirements of this guideline are essentially the same as the corresponding requirements in the preceding guidelines, except that the employee's training need not have been acquired through an accredited course of training. In light of the lesser risk of harm from misuse of this authority, less formal training is acceptable as a basis for permitting employees to administer oaths and affirmations.

f. Authority to Use a Covert Investigative Technique.

The use of covert investigative techniques is often a necessary part of the process of Federal law enforcement, particularly with respect to offenses that, unlike common law crimes, are committed in secrecy or are readily concealed. On the other hand, because these techniques involve secrecy on the part of the Government, they are often perceived as subject to abuse. Moreover, when abuses do occur, they frequently threaten fundamental rights and invariably jeopardize the Government's investigation or prosecution. For these reasons, an agency should not be authorized to permit its employees to employ these techniques except under the most compelling circumstances and with the strongest possible guarantees against misuse.

With respect to each technique, the essential questions bearing on agency authorization are whether fulfillment of the agency's mission is likely to require regular use of the technique; whether, for reasons of economy, effectiveness, or otherwise, it would be preferable to rely on an agency with established expertise in the use of the technique; and whether the agency's policies and practices governing the use of the technique, as well as the training of its employees, give satisfactory assurance both that the technique will not be abused and that the appearance of abuse will be avoided. As an additional safeguard, the agency's policies and practices regarding the use of covert investigative techniques should require that -- as in the case of authority to carry a firearm -- the use of such techniques be approved on a limited basis by a designated senior official of the agency. Such high level approval is desirable because, as noted above, the use of these

techniques is often subject to criticism and carries unusual potential for causing grave harm to individuals a well as to Federal law enforcement interests.

It should be noted that section 5f. does not address the technique of attempting to secure cooperation by promising a potential witness that he will not be prosecuted or that he will not be prosecuted fully, by promising a favorable sentencing recommendation, by offering him participation in the Witness Protection Program of the U.S. Marshals Service, or by holding out to him the prospect of a similar benefit. Appropriate use of such promises requires careful consideration of a number of factors including the degree of the potential witness's complicity relative to others involved in the case and the value of his cooperation in light of the requirements for successful prosecution. Ordinarily, the prosecutor rather than the investigator is in the best position to assess these factors and determine whether a promise is warranted. Accordingly, Federal investigators should not be given independent authority to make such promises in return for cooperation. This does not mean, of course, that an employee may not make such an offer when specifically authorized by the prosecutor.